

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs June 2, 2009

BRIAN LEE WRIGGLESWORTH v. STATE OF TENNESSEE

Direct Appeal from the Circuit Court for Montgomery County
No. 40400557 John H. Gasaway, III, Judge

No. M2008-02610-CCA-R3-PC - Filed January 14, 2010

The Petitioner, Brian Lee Wrigglesworth, appeals the Montgomery County Circuit Court's dismissal of his petition for post-conviction relief on the basis that it was untimely. On appeal, the Petitioner contends that "since he was actively trying to obtain legal help with his case, an exception to the statute of limitations rule for post-conviction should be made." Upon review, we conclude that the Petitioner waived this issue because he failed to provide an adequate record. Therefore, we affirm the post-conviction court's dismissal.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

CAMILLE R. McMULLEN, J., delivered the opinion of the court, in which JERRY L. SMITH and JOHN EVERETT WILLIAMS, JJ., joined.

Gregory D. Smith, Clarksville, Tennessee, for the Petitioner-Appellant, Brian Lee Wrigglesworth.

Robert E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; John Wesley Carney, Jr., District Attorney General; and Arthur F. Bieber, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

On May 22, 2006, the Petitioner pleaded guilty to three counts of rape of a child in the Circuit Court for Montgomery County. He asserts that he received a sentence of thirty years in the Tennessee Department of Correction for these offenses, although copies of his judgment forms are not included in the record. The Petitioner claims that he filed a timely motion to withdraw his guilty pleas. He also claims that on June 4, 2007, the trial court issued a written order denying his motion to withdraw his guilty pleas. Neither the motion

nor the written order denying the motion to withdraw his guilty pleas is contained in the record.

On July 25, 2008, the Petitioner filed a pro se petition for post-conviction relief which included the following claims: (1) his conviction was based on an unlawfully induced guilty plea or a guilty plea involuntarily entered, (2) his conviction was based on a violation of the privilege against self-incrimination, (3) he was denied effective assistance of counsel, (4) his conviction was based on overzealousness by the police and the district attorney's office, and (5) his conviction was based on the investigating detective's focus on hearsay rather than evidence. The Petitioner also claimed in his pro se petition that the one year statute of limitations should not bar his claim because his "post conviction paper work [was lost] . . . in the mail, last July." He also stated that following the trial court's denial of his motion to withdraw his guilty plea he "requested [his] lawyer . . . to appeal" but his attorney did nothing and failed to communicate with him.

On August 14, 2008, the post-conviction court appointed the Petitioner counsel for the purpose of investigating whether his pro se post-conviction petition was timely filed. In a written report to the court filed on September 18, 2008, appointed counsel said that his investigation revealed that the Petitioner's mother contacted Innocent, Inc., a now inactive part of the University of Tennessee Legal Aid Clinic, for assistance with the Petitioner's case and that the Petitioner contacted one attorney to review his case prior to filing his pro se petition. In this filed report, appointed counsel stated, "While it appears that Petitioner missed his statute of limitations, it is clear that Petitioner was attempting to pursue the claims and fundamental fairness should allow the Court to consider this petition." By written order on October 23, 2008, the post-conviction court summarily dismissed the petition as untimely without a hearing. On November 6, 2008, the Petitioner filed a timely notice of appeal.

ANALYSIS

In his appeal to this court, the Petitioner argues that he should be given an exception to the one year statute of limitations for post-conviction relief because he was "actively trying to obtain legal help with his case." See T.C.A. § 40-30-102(a). In response, the State argues that the Petitioner has waived this issue because he failed to provide an adequate record on appeal. See Tenn. R. App. P. 24(b). The State correctly notes that the Petitioner failed to include the following documents in the record on review: a copy of his plea agreement, the transcript from the plea submission hearing, his judgment forms, the transcript from the hearing on the Petitioner's motion to withdraw his pleas, and the order denying his motion to withdraw his pleas. The State also contends that even if the Petitioner has not waived this issue, the court properly dismissed the petition for post-conviction relief summarily under Tennessee Code Annotated section 40-30-102.

The appellant has a duty to prepare a record that conveys “a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal.” Tenn. R. App. P. 24(b). “Where . . . the record is incomplete, and does not contain a transcript of the proceedings relevant to an issue presented for review, or portions of the record upon which a party relies, this Court is precluded from considering the issue.” State v. Roberts, 755 S.W.2d 833, 836 (Tenn. Crim. App. 1988) (citing State v. Groseclose, 615 S.W.2d 142, 147 (Tenn. 1981); State v. Jones, 623 S.W.2d 129, 131 (Tenn. Crim. App. 1981)). “In the absence of an adequate record on appeal, we must presume that the trial court’s ruling was supported by the evidence.” State v. Bibbs, 806 S.W.2d 786, 790 (Tenn. Crim. App. 1991) (citing Smith v. State, 584 S.W.2d 811, 812 (Tenn. Crim. App. 1979); Vermilye v. State, 584 S.W.2d 226, 230 (Tenn. Crim. App. 1979)). We conclude that the Petitioner has waived this issue for consideration on appeal to this court. However, waiver notwithstanding, even assuming the facts as alleged by the petitioner are true, we conclude the petition for post conviction relief is barred by the statute of limitations. Accordingly, the Petitioner is not entitled to post-conviction relief.

CONCLUSION

Based on the foregoing, the judgment of the post-conviction court is affirmed.

CAMILLE R. McMULLEN, JUDGE